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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12639

D.C. Docket No. 98-00019 CR-1-001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RONALD ALLAN COHEN,
a.k.a. R. ALLAN COHEN,
Defendants-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(September 13, 2002)

Before BIRCH, HILL and HALL*, Circuit Judges

PER CURIAM:

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*Honorable Cynthia Holcomb Hall, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Ronald Allan Cohen appeals his 121-month sentence and conviction for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) and 2. Cohen contends that the district court erred by (1) utilizing an improper base offense level; (2) imposing an eight level enhancement for laundering proceeds in excess of six million dollars; (3) imposing a two level enhancement for use of a specialized skill; (4) imposing a two level enhancement for obstruction of justice; and (4) denying a two-level or four-level reduction for a mitigating role. We AFFIRM.

I. BACKGROUND

The following acts are uncontested. From approximately January 1991 until approximately January 1998, Cohen and several others participated in a financial fraud scheme that laundered multi-million dollar sums of money from individuals around the world. The objective of the scheme was to identify and recruit clients who needed capital for a variety of business and personal projects and investments. Clients were told that if they provided an up-front fee, capital would be provided to the. The fee would be held in escrow and then forfeited if the client failed to arrange a loan within a specified time. In reality, the conspiracy did not have access to the capital required to fund any of these transactions. The scheme was designed so that their clients would not be able to produce the required payment guarantee from a financial institution within the stated time, and therefore, forfeit the fees.

Clients became aware of the group by advertisements placed in newspapers around the country, suggesting that venture capital was available. A "broker" from the group would screen potential clients to determine if they had the funds to pay the fees associated with obtaining venture

capital.[2] Once the broker determined that the client had the funds available, the client was referred to a "syndicator," who was responsible for communicating directly with clients and closing the transactions. The syndicator would advise the client that in order to proceed, the initial fee, which ranged from $50,000 to $2,000,000, must be transferred to a designated escrow account. After the funds were transferred, the syndicator provided the client with documents purporting to verify that investors had set aside the funds necessary to finance the client's transaction and were awaiting the required payment guarantee to proceed.

A "facilitator" would assist the client in obtaining the required payment guarantee from a bank, which was required prior to any funds being provided to the client. The facilitator charged an additional fee and purported to have contacts with offshore banks that would provide such a guarantee. There was no domestic bank that would provide a guarantee without some form of collateral and, in each case, the client did not have the required collateral.

There was also an "underwriter" in the scheme whose role was to arrange for the sale of offshore stock in order to guarantee the repayment of the original capital within a year. There was an additional fee for this service.

Cohen became the attorney for the conspiracy in August of 1995. He was advised that he would act as an escrow agent for funds forwarded to the group, and that he was to place the funds in a trust account at the Caribbean American Bank in Antigua. An Antiguan corporation,

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[2]The client was required to submit a photocopy of a cashier's check in the amount of the fee. The broker would then contact the bank to ensure that the check was genuine.

Nilnor S.A., was formed in order to facilitate payments to Cohen for his services.

Cohen maintained a law office in Thomasville, Georgia under the name Ronald a. Cohen. He set up a separate office in Coolidge, Georgia to perform work for the conspiracy under the name R. Allan Cohen. Cohen hired Kathy Spurling to operate the Coolidge office. He had little direct contact with his office, but rather instructed Spurling to follow his co-conspirators' instructions. Cohen's office was responsible for establishing foreign corporations for clients, issuing contractual documents, verifying that funds existed to support contracts, forwarding default notices to clients, and splitting up the advance fees paid by clients to the members of the conspiracy.[3] Cohen admitted that "[during] the period [he] was directly involved with the group, at least 38 transactions were handled by the office he set up in Coolidge, Georgia, resulting in the loss of approximately $6,028,090 by victims of the group." R12-16-17. Cohen, however, received fees of only a few thousand dollars for each transaction totaling $109,000.

After several members of the conspiracy were indicted and arrested, Cohen retained an attorney in Antigua in order to recover the funds which remained in the Caribbean American Bank. Cohen represented to the Antiguan attorney that he had full power of attorney over ten accounts which contained $799,000 and that the funds were acquired legally.

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[3]In 1996, Cohen learned that he was prohibited by a Georgia Bar Association regulation from maintaining a trust account at the Antiguan bank, and , therefore, the Caribbean American Bank became the escrow agent for the transactions. Cohen became the attorney for the bank and retained signature authority over the escrow accounts to which the clients sent the advance fees.

On 28 March 1998, a grand jury returned a two count indictment against Cohen and several others involved in the conspiracy. On 21 January 1999, Cohen pled guilty to Count One of the indictment for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) and 2. The district court sentenced Cohen to 121 months imprisonment. Cohen appeals his sentence.

II. DISCUSSION

We review the district court's factual findings for clear error and its application of the Sentencing Guidelines ("U.S.S.G.") to those facts de novo. United States v. Trujillo, 146 F.3d 838, 847 (11th Cir. 1998).

Cohen maintained that his base offense level should have been 20, not 23. Cohen argues that he was cited in the indictment for violating 18 U.S.C. §§ 1956(h) and 2, and not § 1956(a)(1)(A) or (a)(3)(A), the provisions specified in U.S.S.G. § 2S1.1(a)(1) as a prerequisite for a base offense level of 23. Cohen also argues that the indictment failed to charge that he intended to commit the underlying substantive offense of money laundering, therefore, it did not state a violation of § 195(a)(1)(A).

U.S.S.G. § 2S1.1(a)(1) provides that the base offense level for money laundering is 23, if convicted under 18 U.S.C. § 1956(a)(1)(A),(a)(2)(A) or (a)(3)(A), or 20, otherwise U.S.S.G. § 2S1.1(a)(1)(2000). A higher base offense level is specified if the defendant is convicted under subsections (a)(1)(A), (a)(2)(A), and (a)(3)(A) because those subsections apply to defendants who encourage or facilitate the commission of further crimes. United States v. Acanda, 19 F.3d 616, 619 (11th Cir. 1994). "[T]he Sentencing

Commission specifically intended defendants convicted of promoting further crimes to receive greater sentences than those defendants who did not act to maintain an ongoing cycle of criminal activity." Id.

Cohen pled guilty to Count One of the indictment:

> to conduct and cause to be conducted, financial transactions, knowing that the funds and monetary instruments involved in these transactions represented the proceeds of a specified unlawful activity, that is wire fraud, in violation of title 18, United States Code, Section 1343, and knowing that the financial transactions were carried out with the intent to promote the carrying on of a specified unlawful activity.

R1-1-2. Since Cohen admitted that he conspired to conduct financial transactions with proceeds from a specified unlawful activity, "with the intent to promote the carrying on of said unlawful activity," the district court appropriately determined his base offense level to be 23. See Acanda, 19 F.3d at 619-20.

Although the indictment failed to make specific reference to § 1956(a)(1)(A)(i), its language mirrored that found in subsection (a)(1)(A)(i). 18 U.S.C. § 1956(a)(1)(A)(i) provides that "[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity–[] with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine . . . or imprison[ed] for not more than [20] years, or both." Since

Cohen does not claim that the indictment's omission of the applicable subsection misled him, the omission should nether be grounds for dismissal of the indictment nor a basis for the reversal of his conviction. See Fed.R.Crim.P.7(c)(3); see also United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981) (per curiam).

Next, Cohen argues that the district court erred in finding that the government met its burden of proving the amount of loss attributable to him justifying an eight-level enhancement, pursuant to U.S.S.G. § 2S1.1(b)(2)(I). The district court's determination concerning the amount of money involved in a money-laundering scheme constitutes a factual finding reviewed for clear error, while the district court's interpretation of the Sentencing Guidelines is subject to de novo review. United States v. Barrios, 993 F.2d 1522, 1524 (11th Cir. 1993). The Sentencing Guidelines provide that, if the value of the funds laundered exceed $6,000,000, the base offense level should be increased by eight levels. U.S.S.G. § 2S1.1(b)(2)(I)(2000). "The 'value of the funds' . . . is identified by § 2S1.1(b)(2) as a 'Specific Offense Characteristic' and, therefore, sentencing under that section necessarily must take into account' all acts and omissions committed . . by the defendant . . . during the commission of the offense." Barrios, 993 F.2d at 1524 (citation omitted).

Cohen argues that $800,000, the amount of loss resulting from his power of attorney, was the maximum financial loss that should be attributed to him. He also maintains that if $6,028,090 was to be attributed to him entirely, $28,900, which is the amount he spent for personal purposes, should be deducted from that amount, which would result in a four level enhancement, pursuant to § 2S1.1(b)(2)(H). The district court, however, found that Cohen was responsible for the money laundered from the

transactions in which he and his office participated. Cohen admitted that "[during] the period [he] was directly involved with the group, at least 38 transactions were handled by the office he set up in Coolidge, Georgia, resulting in the loss of approximately $6,028,909 by victims of the group." R12-16-17. Therefore, the district court did not err in its finding that Cohen was responsible for over $6,000,000 in losses and in enhancing his base level offense level by 8 levels, pursuant to U.S.S.G. § 281.1(b)(2)(I

Next, Cohen maintains that the district court erred when it enhanced his sentence by two levels for use of a specialized skill, pursuant to U.S.S.G § 3B1.3. A sentencing court's determination that a defendant used a special skill to commit or conceal the offense is a factual finding reviewed for clear error and the legal meaning of the term "special skill" is reviewed de novo. United States v. Malgoza, 2 F.3d 1107, 1110 (11th Cir. 1993) (per curiam). A "[s]pecial skill refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." U.S.S.G. § 3B1.3, comment. (n.3). Examples include lawyers, doctors and accountants. Id. To impose an enhancement for use of a special skill, the court must find that (1) Cohen possesses a special skill; and (2) he used it to significantly facilitate the commission or concealment of his offense. United States v. Foster, 155 F.3d 1329, 1331 (11th Cir. 1998).

Cohen's argument that he simply lent his name and letterhead to the conspiracy without knowledge of the scheme has no merit. The district court specifically found that, although Cohen did not review the documents that left his office, he (1) instructed his secretary to follow his co-conspirators' instructions and permitted his name to be used, and (2) attempted to obtain the release of the conspiracy's

frozen funds after the arrest of several co-conspirators. Furthermore, the district court found that the conspiracy could not have operated without a person like Cohen who (1) acted as an escrow attorney, (2) lent his signature to letters certifying to clients that the funds were available for their venture, and (3) signed numerous powers of attorney, all in attempt to facilitate the continuance and concealment of the conspiracy. Therefore, the district court correctly concluded that Cohen used his legal training to significantly facilitate the commission of money laundering.

Cohen also contend that the district court erred when it enhanced his sentence by two levels for obstruction of justice, pursuant to U.S.S.G. § 3C1.1. Whether the district court properly applied the obstruction of justice enhancement is a mixed question of law and fact. The district court's factual findings are reviewed for clear error and its conclusions of law are reviewed de novo. United States v. Arguedas, 86 F.3d 1054, 1059 (11th Cir. 1996). The Sentencing Guidelines mandate a two-level increase if the defendant willfully impeded or obstructed, or attempted to impede or obstruct, "the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. 3C1.1.

Cohen argues that the obstruction of justice enhancement was based on the same conduct for forming the basis of his guilt, and that he is impermissibly being punished twice for the same conduct, attempting to obtain the release of frozen funds. The district court found that Cohen impeded the administration of justice during the course of the investigation by moving funds from a Caribbean Bank to the United States following the arrests of co-defendants. Cohen's base offense level was imposed because of the 38 transactions handled by his office. The

enhancement for obstruction of justice was based on his certifying that the funs in the account were acquired legally and were free of encumbrances, in an attempt to withdraw the monies following the arrest of his co-conspirators. This conduct is independent of his base offense level conduct, therefore, the district court did not err.

Finally, Cohen argues that the district court improperly denied a downward adjustment for his minor or minimal participation in the offense. A district court's determination of a defendant's role in an offense constitutes a factual finding reviewed for clear error. United States v. De Varon, 175 F.3d 930, 937 (11th Cir. 1999) (en banc). Cohen bears the burden of proving by a preponderance of the evidence that he is entitled to a role reduction. See id. At 939. The Sentencing Guidelines provide a four-level reduction for a defendant who acts as a minimal participant in a criminal activity. U.S.S.G. § 3B1.2(a). A minimal role reduction is intended for defendants who are among the least culpable of the group. "[A] defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant." U.S.S.G. § 3B1.2, comment. (n.1). A minor participant, on the other hand, is "any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3). A minor participant is entitled to a two-level reduction, pursuant to U.S.S.G. § 3B1.2(b).

We have held "where the relevant conduct attributed to a defendant is identical to [his] actual conduct, [he] cannot prove that [he] is entitled to a minor role adjustment simply by pointing to some broader criminal scheme in which [he] was a minor participant but for which [he] was not held accountable." De Varon, 175 F.3d at 941. Cohen has failed

to establish that the district court's denial of a mitigating-role reduction was clearly erroneous. The relevant conduct attributed to Cohen was the 38 transactions that were conducted through his office, which resulted in a loss of $6,028,090. Therefore, the district court did not err in denying him a mitigating-role reduction.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12639-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD ALLAN COHEN,
a.k.a. R. ALLAN COHEN,

Defendants-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Date filed: January 30, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___F.2d_____).

Before BIRCH, HILL and HALL*, Circuit Judges

PER CURIAM:

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*Honorable Cynthia Holcomb Hall, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

EXCERPT FROM SENTENCING TRANSCRIPT

THE COURT: All right. On the objections raised by the defendant, the objection raised to Paragraph 79 - - excuse me, 75 is the first one. As to the base level, the probation office has determined it should be a base level of 23. The defendant says it should be a base level of 20. That objection is overruled.

The probation officer has, in fact, correctly applied the base level and has determined from the evidence that has been presented throughout the course of the trial, as well as presented here in this hearing, that the money was used to promote this enterprise, which would make the 23 base level applicable.

As to the objection in 76, as to the amount for which this defendant is held responsible, the amount of 6 million 28 thousand dollars, is, in fact, the correct amount, minimum amount, for which this defendant should be held responsible. It is the amount that's specified in the plea. It's the amount that's substantiated through the 38 transactions that was handled by Mr. Cohen or his office in Coolidge, Georgia. The victims lost 6 million, 28 thousand, 90 dollars. So that objection is overruled. The position of the probation officer is substantiated.

The objection to Paragraph 79, the objection being that this defendant should receive a mitigating role in the offense and should receive a four-level adjustment for a minimal role or a two-level for a minor role, that objection is overruled.

There's nothing in this regard that would substantiate, under the rules of the law, that would qualify Mr. Cohen for

a minium, minor role in this operation. His was a major, it was an important role and it would not have operated without him or someone like him lending their office as attorney to this proceedings or those endeavors.

Objection to Paragraph 80, there was an objection to the two-level enhancement for obstruction of justice in the movement of the – or attempted movement of the funds out of the Caribbean Bank – I guess that was the Caribbean American Bank – after Mr. Sangaree had been arrested and this certainly is a proper enhancement. The objection is overruled.

Mr. Cohen did continue to try to obstruct justice here by trying to get those monies into the hands of one of his co-conspirators.

There was argument made that there should be a departure, because this is not within the heartland of the offense. That's not borne out by the facts of this case or the law. It's a heartland offense. No departure for that.

I'm trying to see if I covered them all.

MR. JACOBSON: Special skill.

THE COURT: Yes. As it was pointed out by the government and as the evidence points out during the course of this trial, that it was, in fact, that there was an attorney involved in here that many of the victims pointed to as being the – in fact, it was David Sollis.

He did use these skills either as the attorney – as the escrow attorney or as attorney for the escrow agent. The fact that he, according to his own testimony, just opened his

office, put a signature o the computer and said, "Do what else – do whatever Mr. Sangaree tells you to do," just turned Mr. Sangaree into the lawyer. But it wouldn't have operated without his position, his skills. He's not entitled to any reduction and enhancement – or special skills as warranted.

There was testimony given and statements made both at trial and in this sentencing hearing that Mr. Cohen did not approve or review any of the documents that went through his office. He specifically instructed the person in charge there, Kathy Sperling, that Mr. Sangaree had full authority and to follow his instructions.

The fact that he was a caring person is not the issue here. As I said, this scheme would not have worked unless Mr. Cohen or someone like him was in the position that he occupied as either escrow attorney or attorney of the escrow attorney.

On the issue raised as to the denial of the 5K-1, the government recited to the plea agreement as to the facts – I mean to the fact that Mr. Cohen had to be truthful in all of this dealings, including his assets. The law, as I understand it, is that this court's authority to review the government's refusal to file a substantial assistance motion is limited to determine whether that decision was, one, animated by an unconstitutional motive, or, two, not rationally related to a legitimate government end.

I find nothing in this evidence or argument that shows their decision was animated by an unconstitutional motive nor that it was not rationally related to the legitimate government end; that end being the requirement that Mr. Cohen cooperate, he cooperate fully and cooperate truthfully.

There is some dispute now as to whether he was truthful on his assets. Certainly the testimony presented here could show – or does show that the government's position was snot unreasonable at all. That is, it's now attempted to be explained away, along with some other issues, as not bad.

There's no basis here for this court to make an intervention in the decision of the government in the 5K-1 issue.

So the Court – I believe I've answered all of the objections raised. I find that the presentence report to be complete, true and accurate.

It's the judgment of this court that this defendant be committed to the custody of the Bureau of Prisons for a term of 121 months. This is the low end of the guidelines, but I believe it's sufficient.

This defendant does have the financial ability to pay a fine. I impose a fine in the amount of $100,000 to be paid immediately.

I also assess a $100 special monetary assessment as required by law. That's due immediately.

Upon his release from confinement, he'll be placed on supervised release for a term of three years.

He is ordered to report in person to the probation office in the district into which he is released within 72 hours of his release.

He's subject to all the general terms and conditions of supervision in this district as well as the following special: That is, he will not own or possess any firearm, dangerous weapon or destructive device. He'll provide the probation office with access to all requested financial information. And if he has not paid his financial obligations prior to coming on supervision that he will pay all outstanding amounts in a monthly installment that will assure that such sum will be paid fully prior to him being released from supervision.

So the sentence imposed is 121 months followed by a three-year terms of supervised release, a $100,000 fine and $100 special monetary assessment.

MR. JACOBSON: Judge, the defendant was incarcerated –

THE COURT: Just let me finish.

MR. JACOBSON: Oh, I'm sorry.

THE COURT: Mr. Cohen, you have no right to appeal this judgment and sentence. You gave that right up at the time you pled guilty except as to an illegally imposed sentence or the failure of this court to properly follow the sentencing guidelines.

MR. CRANE: Excuse me, Your Honor. I'm new to the case, but I believe that he has a right to appeal any aspect of the sentencing.

THE COURT: I'm telling him what his rights were when he pled guilty. He gave up everything except

two things: An illegally imposed sentence or the failure to properly apply the sentencing guidelines.

Any appeal to which you may be entitled, you must exercise your right of appeal within ten days of today's date. If you do not file a notice of appeal within ten days of today's date, you lose your right to ever appeal.

If it is your desire to appeal and you do not have the funds to prosecute your own appeal, I would consider the appointment of a lawyer to represent you.

But do you understand, Mr. Cohen, that you have only ten days to file any appeal. to which you may be entitled?